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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

STATE OF TEXAS,

Petitioner,

v.

RAYMOND LEVI COBB,

Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

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BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS AND THE COMBINED LAW ENFORCEMENT ASSOCIATIONS OF TEXAS IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

I.

May an accused make an effective unilateral waiver of his Sixth Amendment right to counsel under *Michigan v. Jackson*, 475 U.S. 625 (1986), and *Patterson v. Illinois*, 487 U.S. 285 (1988), when his only previous "assertion" of that right to counsel consisted of accepting appointment of counsel following indictment on a different, but factually related, crime nearly a year and a half earlier?

II.

When an accused has been indicted for burglary, does his Sixth Amendment right to counsel attach under *Maine v. Moulton*, 474 U.S. 159 (1985), and *McNeil v. Wisconsin*, 501 U.S. 171 (1991), to questioning about a factually related murder when the eventual capital murder conviction is not based on the previously charged burglary as a predicate felony?

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STATEMENT OF INTEREST OF *AMICI CURIAE* [1]

The National Association of Police Organizations (NAPO) is a non-profit organization that represents state and local law enforcement officers throughout the United States. NAPO is a coalition of associations and unions that advances the interests of law enforcement officers through advocacy, education, and legislation. NAPO represents 4,000 organizations with more than 220,000 sworn law enforcement officers and 11,000 retired officers.

The Combined Law Enforcement Associations of Texas (CLEAT) is a non-profit organization that represents state and local law enforcement officers in Texas and advances the interests and legal rights of law enforcement officers. It is the largest and one of the oldest state law enforcement labor organizations in Texas. CLEAT represents over 12,000 peace officers, correctional officers, public safety employees, and other board-approved classes of members.

Both NAPO and CLEAT and the officers they represent have a direct and immediate interest in any issues that affect the ability of law enforcement officers to investigate crimes. This case presents precisely such issues. If upheld, the Texas Court of Criminal Appeals' decision would create a wholly unworkable rule for the law enforcement profession. Here, even though officers in one Texas jurisdiction had no knowledge of respondent's indictment or retention of counsel on a burglary charge in another jurisdiction 500 miles away, and even though they scrupulously adhered to all requirements to warn respondent of his rights and to secure a valid waiver before questioning him on the distinct charge of murder, respondent's confession to a double murder was suppressed.

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[1] The parties have consented in writing to the filing of this brief in letters that have been submitted to the Clerk. *See* S. Ct. R. 37.3(a). Counsel for a party did not author this brief in whole or in part. *See* S. Ct. R. 37.6. No person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. *See id.*

A rule requiring suppression of a voluntary statement of a confessed murderer obtained through entirely good-faith and proper police work will do nothing but hamstring legitimate police efforts to solve crimes and take offenders off the streets. Neither this Court's precedents nor the Constitution requires this result.

STATEMENT OF THE CASE

On December 27, 1993, respondent Raymond Levi Cobb brutally murdered and secretly buried Margaret Owings and her baby daughter Kori Rae in the course of burglarizing their home. Cobb was soon questioned by Walker County police about the burglary, and he confessed to that crime. He denied involvement, however, in the disappearance of Margaret and Kori Rae. Cobb was then indicted for burglary and counsel was appointed for him on that charge. *See* Pet. App. A-4.

After he was released on bail, Cobb moved more than 500 miles away to Odessa, Texas. While there in 1995, he confessed to his father that he had murdered Margaret and Kori Rae. Cobb's father reported the confession to the Odessa police, who contacted the Walker County Sheriff's office and obtained an arrest warrant for the murder. Unaware that Cobb had been indicted and had accepted appointed counsel for the burglary charge, the Odessa police arrested him and informed him of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). In fact, they provided Cobb with more protection than *Miranda* requires, advising him of his rights in writing and obtaining a written waiver, which Cobb signed before a witness. Cobb then signed a written statement confessing to the murders. Pet. App. A-5. He was subsequently convicted of the double murder and sentenced to death.

The Texas Court of Criminal Appeals overturned the conviction on the ground that the confession violated Cobb's Sixth Amendment right to counsel. According to the court

below, "once the right to counsel attaches to [an] offense charged, it also attaches to any other offense that is very closely related factually to the offense charged." *Id.* at A-6. The court concluded that the double murder was "factually interwoven" with the burglary, and thus that Cobb's Sixth Amendment right to counsel with respect to the murders had attached upon the indictment for the burglary. *See id.* at A-7.

The court also held Cobb's waiver of the right to counsel invalid because he had "asserted" his right to counsel under *Michigan v. Jackson*, 475 U.S. 625 (1986), by "accepting appointment [of] counsel" for the burglary charge. Pet. App. A-7. The court held that "once the right to counsel has attached and has been invoked, any subsequent waiver during police-initiated interrogation is ineffective unless counsel has first given permission for the interrogation." *Id.* at A-6. The court concluded that it made no difference that the Odessa police had acted in good faith and had not known about the prior burglary indictment. It held that the court should "'impute the State's knowledge from one state actor to another.'" *Id.* at A-7 (quoting *Jackson*, 475 U.S. at 634).

SUMMARY OF ARGUMENT

1. The "essence" of the prophylactic rule created in *Michigan v. Jackson* is "[p]reserving the integrity of an accused's *choice* to communicate with police only through counsel." *Patterson v. Illinois*, 487 U.S. 285, 291 (1988) (emphasis added). An affirmative *assertion* of the right to counsel is thus crucial for invoking the protections of *Jackson*.

The court below improperly expanded *Jackson* beyond its logical limits by applying it where the defendant had never *asserted* his right to counsel at all. Respondent here merely accepted a court appointment of counsel. The acceptance of counsel and the creation of an attorney-client relationship have nothing to do with a defendant's expressed *choice* to deal with

police solely through counsel. And it was that *choice* that *Jackson* was designed to protect. Expanding the prophylactic rule of *Jackson* beyond the limits of the rationale that justified its creation will serve only to hamper legitimate police efforts to solve crimes.

2. The Sixth Amendment right to counsel, and the *Jackson* prophylactic rule, are offense-specific. *See McNeil v. Wisconsin*, 501 U.S. 171, 175-76 (1991). Nothing in this Court's precedents supports the lower court's conclusion that there should be an exception to the rule of offense-specificity where an uncharged crime is "closely related factualiy" to an offense that has been charged. Pet. App. A-6.

Even if the Court were inclined to recognize some exception to the offense-specific character of the Sixth Amendment right to counsel (a course that *amici* do not advocate), at a minimum the Court should not endorse the vague standard used below. A test based on the malleable touchstone of whether two crimes are "closely related factually" would produce utterly unpredictable results and thus would not provide law enforcement officers reliable guidance to inform their conduct. Any exception to the rule of offense-specificity, therefore, should be based on an examination of the conduct that defines the offenses in question. Two crimes should be considered "closely related" only where the same conduct satisfies the elements of both crimes.

3. By expansively applying *Jackson* even to cases where a defendant has never affirmatively asserted his right to counsel and by broadly interpreting the standard for determining whether two offenses are "closely related," the court below has created an unworkable rule that will unduly hinder legitimate police efforts to solve crimes and take offenders off the streets.

ARGUMENT

I. THE LOWER COURT ERRED BY APPLYING THE PROPHYLACTIC RULE OF *MICHIGAN v. JACKSON* IN A CASE WHERE THE ACCUSED NEVER AFFIRMATIVELY INVOKED HIS RIGHT TO COUNSEL.

In *Michigan v. Jackson*, this Court concluded that, after a criminal defendant's Sixth Amendment rights have attached and the defendant has asserted his right to counsel, police may not initiate questioning to obtain a valid waiver of the defendant's Sixth Amendment rights. *See* 475 U.S. at 630-36. As explained below, the rule in *Jackson* hinges on the defendant's affirmative *assertion* of his right to counsel and is designed to preserve the defendant's *choice* to deal with police solely through counsel. The court below, however, applied *Jackson* even though respondent had never asserted his right to counsel at all and had simply accepted counsel appointed by a court. That is a wholly unwarranted expansion of *Jackson* that will not advance the interests protected by the declared rationale of the case. Instead, it will only hinder legitimate police efforts at solving crimes.

In *Michigan v. Jackson*, this Court determined that once formal criminal proceedings have been initiated against a suspect on a particular charge, thereby triggering attachment of the Sixth Amendment right to counsel, and the suspect has asserted his right to counsel, the suspect cannot subsequently make a valid waiver of the right in a police-initiated interrogation unless counsel is present. In essence, the Court extended to the Sixth Amendment the rule developed in the context of the Fifth Amendment right to counsel in *Edwards v. Arizona*, 451 U.S. 477 (1981). Under *Edwards*, it is conclusively presumed that once a suspect has invoked his right to counsel, any subsequent waiver of the right to counsel in a police-initiated interrogation will be invalid, unless made in the

presence of counsel. The logic of the rule announced in *Jackson* necessarily hinged on the accused's affirmative *assertion* of his right to counsel. The Court, indeed, explained its ruling in precisely those terms. It noted that *Edwards*, on which it relied, "is grounded in the understanding that the *assertion* of the right to counsel is a significant event, and that additional safeguards are necessary when the accused *asks for* counsel." *Jackson*, 475 U.S. at 636 (emphases added) (internal citations and quotation marks omitted). The *Jackson* Court went on to make clear that an affirmative assertion of the right was similarly the touchstone in the Sixth Amendment context: "We conclude that the *assertion* is no less significant, and the need for additional safeguards no less clear, when the *request for counsel* is made at an arraignment and when the basis for the claim is the Sixth Amendment." *Id.* at 636 (emphases added).

In *Patterson v. Illinois*, 487 U.S. 285 (1988), the Court reiterated that an accused must actually *invoke* the right to counsel to enjoy the protections of *Jackson*. The accused in *Patterson* had never asserted his right to counsel, but nonetheless claimed that once his Sixth Amendment rights attached at indictment, police were thereafter barred from initiating contact with him. *Id.* at 290. The Court rejected this argument and explained that the "decision in *Jackson* . . . turned on the fact that the accused 'ha[d] *asked* for the help of a lawyer' in dealing with the police." *Id.* (quoting *Jackson*, 475 U.S. at 631) (emphasis added). *Patterson* thus confirmed that "the essence of *Edwards* and its progeny" is "[p]reserving the integrity of an accused's choice to communicate with police only through counsel" – "not barring an accused from making an *initial* election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone." *Id.* at 291 (emphasis in original).

The Court subsequently reaffirmed the rationale behind *Jackson* in *Michigan v. Harvey*, 494 U.S. 344 (1990). There, the Court explained that the purpose of the rule in *Jackson*, like the rule in *Edwards*, is to "prevent police from badgering a defendant into waiving his *previously asserted*" rights. *Id.* at 350 (emphasis added). The decision was thus "based on the supposition that suspects who *assert* their right to counsel are unlikely to waive that right voluntarily in subsequent interrogations." *Id.* (emphasis added). Where there has never been any assertion of the right in the first place, the logic behind *Jackson* simply does not apply.

Jackson, in short, is a decision that brings the protections of the Sixth Amendment to bear in support of an individual's exercise of free will. The key for securing the benefit of *Jackson* is that the accused must make an affirmative *assertion* of the right to counsel indicating the he has decided to deal with the government through the medium of counsel.[2]

The Texas Court of Criminal Appeals extended *Jackson* far beyond the rationale underpinning the decision by applying it to a defendant who had never *asserted* his right to counsel at all, but had simply accepted a court-appointed counsel. That novel approach finds no basis in this Court's precedents and should be rejected as an unwarranted extension

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[2] Several lower courts have recognized the foundations of the *Jackson* rule and have understood that *Jackson* cannot logically be extended to the situation where an accused, rather than affirmatively seeking counsel, simply accepts appointment of counsel. *See, e.g.*, *State v. Carter*, 664 So. 2d 367, 383, 380 (La. 1995) ("[s]omething more than mere mute acquiescence in the appointment of counsel" is necessary to trigger *Jackson*); *Montoya v. Collins*, 955 F.2d 279, 283 (5th Cir. 1992) ("For purposes of *Jackson*, an 'assertion' means some kind of positive statement or other action that informs a reasonable person of the defendant's 'desire to deal with the police only through counsel.'"(citation omitted)).

of *Jackson* that is completely unrelated to the announced purpose of the prophylactic protections created in that case.

At the outset, this Court should examine any attempt to expand *Jackson* beyond its logical underpinnings with particular skepticism, because the rule applied in *Jackson* is not a constitutional requirement in itself, but rather a "prophylactic rule." *Harvey*, 494 U.S. at 345. *Jackson*, after all, "simply superimposed the Fifth Amendment analysis of *Edwards* onto the Sixth Amendment." *Id.* at 350. And it is settled that *Edwards* "is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose." *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987). Indeed, it is really a "*second layer* of prophylaxis for the *Miranda* right to counsel." *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991) (emphasis added). *See also Harvey*, 494 U.S. at 350 (*Edwards* is a "second layer of protection").

The Court must be particularly careful in expanding the reach of this prophylactic rule because, as the Court has already acknowledged, broadening the application of *Jackson* could "seriously impede effective law enforcement." *McNeil*, 501 U.S. at 180.[3] Precisely because it sweeps more broadly than the Constitution requires, *Jackson*'s prophylactic rule already will "render some otherwise valid waivers of constitutional rights invalid." *Harvey*, 494 U.S. at 353; *see also id.* at 345 (*Jackson* presumes certain waivers invalid "even if voluntary, knowing, and intelligent under traditional standards").

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[3] *Cf. also Arizona v. Roberson*, 486 U.S. 675, 688 (1988) (Kennedy, J., dissenting) (Court must ensure that justification for any expansion of prophylactic rules is consistent "with the practical realities of suspects' rights and police investigations"); *id.* at 691 ("Balance is essential when the Court fashions rules which are preventative and do not themselves stem from violation of a constitutional right.").

Expanding *Jackson* would thus necessarily have a high cost in terms of prohibiting constitutionally permissible police efforts at solving crimes.

Indeed, in this regard, it bears emphasizing that wherever *Jackson* is applied, it automatically forecloses any police attempts even to initiate an interview with an accused in order to obtain a confession through a knowing, constitutionally valid waiver of rights. Obtaining confessions through voluntary waivers, however, is *crucial* for solving crimes. As this Court has often reiterated, admissions of guilt resulting from valid waivers of rights "are more than merely desirable; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran v. Burbine*, 475 U.S. 412, 426 (1986) (citation omitted). Expanding the application of *Jackson* unnecessarily would thus interfere with one of the most critical tools police have for solving crimes and obtaining the evidence needed to secure convictions. Precisely because "the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good," *McNeil*, 501 U.S. at 181, expansion of *Jackson* must be carefully circumscribed to avoid unjustifiably hampering legitimate law enforcement efforts. Unwarranted expansion of the rule would only frustrate proper police investigations and ensure that "society would be the loser." *Id.*

Any extension of *Jackson* beyond its current confines, moreover, must be treated warily for a further reason: the *Jackson* rule already contains an element of artificiality designed to provide overinclusive protection of a suspect's Sixth Amendment rights. As this Court explained in *McNeil*, by foreclosing police-initiated questioning once a charged suspect has invoked his right to counsel, *Jackson* effectively assumes that *any* assertion of the right to counsel after the Sixth Amendment has attached indicates that the suspect wishes to have counsel present during any contact with investigators.

See 501 U.S. at 179-80. But there is not necessarily a basis in fact for that assumption. When a defendant makes a general statement at an arraignment, for example, indicating that he would like to have appointed counsel, there is no reason to think that he is thereby indicating an unwillingness to undergo *any* custodial interview without an attorney. *See id.* To the contrary, it is entirely possible that, while a suspect may want the assistance of counsel for trial and other more formal stages of the criminal process, he would remain willing to speak to investigators in an interview without counsel present. *Cf. Patterson*, 487 U.S. at 294 n.6, 297-300 (describing limited role that counsel would play in post-indictment questioning). The Court, however, to ensure that defendant's rights are protected, has decided that such a request should be "legally presumed" to amount to an indication that the accused wants the assistance of counsel in *all* settings. *McNeil*, 501 U.S. at 179.

Extending the rule of *Jackson* even further to apply where a suspect has made *no* request for counsel, but has merely been appointed counsel, simply makes no sense given the concerns that animated creation of the prophylactic rule in the first place. It would foreclose legitimate police efforts to obtain voluntary statements from a charged suspect even where the suspect had never expressed either a desire to have counsel present during interviews or even a general desire to have the assistance of counsel after formal criminal proceedings had begun. Rather, it would bar police-initiated contact solely because counsel had been appointed. But that result in no way furthers the objectives behind the *Jackson* rule, which was designed to protect a suspect's "*choice* to communicate with police only through counsel." *Patterson*, 487 U.S. at 291 (emphasis added).

The courts that have concluded that the appointment of counsel should trigger the full protections of *Jackson* have

simply cut *Jackson* loose from its anchor in the suspect's affirmative assertion of his right to counsel. In so doing, they have typically relied on ambiguous *dicta* from this Court's decisions in *Patterson* and *Moran v. Burbine*, 475 U.S. 412 (1986).[4] In *Patterson*, the Court held that an indicted suspect not represented by counsel could validly waive his Sixth Amendment right to counsel by waiving the rights described in *Miranda* warnings. *See* 487 U.S. at 292-95. The Court noted in a footnote that it was "a matter of some significance that petitioner had not retained, or accepted by appointment, a lawyer to represent him at the time he was questioned by authorities. Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect." *id.* at 290 n.3. (citing *Maine v. Moulton*, 474 U.S. 159, 176 (1985)). In *Moran*, the Court indicated, also in *dicta*, that "once the [Sixth Amendment] right has attached, it follows that the police may not interfere with the efforts of a defendant's attorney to act as a ' "medium" between [the suspect] and the State' during the interrogation." *Moran*, 475 U.S. at 428 (also citing *Moulton*, 474 U.S. at176).

But the *dicta* outlined above in no way support the expansive view that the mere appointment of counsel somehow justifies triggering *Jackson*. In both *Patterson* and *Moran*, when the Court vaguely suggested that the Sixth Amendment provided special protections where an attorney-client relationship existed, it relied on *Maine v. Moulton*. *Moulton* was the end of a line of cases involving efforts by investigators to obtain incriminating statements from suspects through covert means (*e.g.*, through informants) after Sixth Amendment rights had attached. *See, e.g., Massiah v. United States*, 377 U.S. 201

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[4] *See, e.g., Dew v. United States*, 558 A.2d 1112, 1116 (D.C. 1989); *Holloway v. State*, 780 S.W.2d 787, 783 (Tex. Crim. App. 1989).

(1964). As this Court has explained, those cases stand for the principle that "once formal criminal proceedings begin, the Sixth Amendment renders inadmissible in the prosecution's case in chief statements 'deliberately elicited' from a defendant *without an express waiver of the right to counsel*." *Harvey*, 494 U.S. at 348 (emphasis added). The constitutional infirmity in cases from the line that started with *Massiah* and culminated in *Moulton* arose because investigators were attempting to obtain statements through surreptitious means and thus necessarily failed to obtain a knowing and intelligent waiver of the accused's Sixth Amendment right to counsel. *See Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986) ("As our recent examination of this Sixth Amendment issue in *Moulton* makes clear, the primary concern of the *Massiah* line of decisions is *secret* interrogation by investigatory techniques that are the equivalent of direct police interrogation.") (emphasis added). A knowing waiver was simply not possible where such covert techniques were used.[5]

Nothing in those decisions, however, suggests that the mere appointment of counsel (or creation of an attorney-client relationship) makes it impossible for police to approach a suspect *openly* in an effort to obtain a knowing and intelligent waiver of the right to the presence of counsel at a post-indictment interview. The Court's reference in *Patterson* to the distinct "safeguards" provided to the "attorney-client relationship," coupled with its citation to *Moulton*, *see* 487 U.S. at 290 n.3, are thus explained entirely by the fact that in

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[5] *See United States v. Henry*, 447 U.S. 264, 273 (1980) ("[T]he concept of a knowing and voluntary waiver of Sixth Amendment rights does not apply in the context of communications with an undisclosed undercover informant acting for the Government."); *cf.* 2 LaFave & Israel, Criminal Procedure § 6.4(f) (2d ed. 1999) ("Waiver is a possibility only when the defendant makes a statement to one known to be in a position adverse to him.").

Moulton and similar cases, the Court has concluded that investigative techniques that are fully permissible in other contexts (such as the use of informants) are impermissible after Sixth Amendment rights have attached and a defendant is represented by counsel. But the Court has never suggested that an accused cannot validly waive his Sixth Amendment right to counsel on a theory that representation by counsel, without more, renders any waiver made in the absence of counsel presumptively invalid under *Jackson*.

Indeed, reliance on *Moran* for the proposition that the creation of an attorney-client relationship triggers some special Sixth Amendment protection is particularly misguided for a further reason. The *Moran* Court itself made it clear that appointment of counsel was not an event of independent significance that triggered special Sixth Amendment protections:

> [T]he suggestion that the existence of an attorney-client relationship itself triggers the protections of the Sixth Amendment misconceives the underlying purposes of the right to counsel. The Sixth Amendment's intended function is not to wrap a protective cloak around the attorney-client relationship for its own sake any more than it is to protect a suspect from the consequences of his own candor.

Id. at 430. The Court went on to explain that its decision in *Moulton* "all but forecloses [the] argument that the attorney-client relationship itself triggers the Sixth Amendment right." *Id.* In *Moulton*, a defendant who was represented by counsel made statements to a police informant about several crimes, only some of which were already the subject of an indictment. The *Moran* Court explained that the statements obtained in *Moulton* concerning *unindicted* crimes could have been used in

a trial on those crimes, even though the statements were obtained from a defendant represented by counsel. *See* 475 U.S. at 431. The Court's reasoning in *Moran* thus undermines any assertion that the appointment of counsel in itself creates a distinct, specially protected Sixth Amendment interest warranting the application of *Jackson*'s prophylactic rule.[6]

In short, nothing in this Court's decisions suggests that the mere appointment of counsel should render a defendant incapable of waiving his rights in a police-initiated interview, after appropriate warnings. *Cf. Patterson*, 487 U.S. at 292-97. To the contrary, the mere acceptance of appointed counsel has nothing whatever to do with the rationale underpinning the prophylactic rule adopted in *Jackson*. As explained above, *Jackson* "is based on the supposition that suspects who *assert* their right to counsel are unlikely to waive that right voluntarily in subsequent interrogations." *Harvey*, 494 U.S. at 350 (emphasis added). Where a defendant has never invoked his right to counsel to begin with, the vital foundation for that supposition is lacking. And there is no basis for concluding that the appointment of counsel itself, without more, should somehow be treated as a surrogate for an indication that the

[6] It is true that the *Moran* Court suggested that the Sixth Amendment right to counsel will provide a special protection in that it precludes "interfere[nce] with the efforts of a defendant's *attorney* to act as a 'medium between the suspect and the State.'" *Moran*, 475 U.S. at 428 (emphasis added) (citation omitted). The Court was there addressing a refusal by police to allow an attorney to contact his client during questioning, *see id.* at 416-18, and made clear that under Fifth Amendment analysis, the efforts of the *attorney* to contact the defendant were irrelevant. But even if the Sixth Amendment would provide some protection to an *attorney's* efforts to act as the intermediary between his client and police (as distinct from the *defendant's* assertion of his right to counsel), such a rule is irrelevant here. There is no suggestion in this case that respondent's appointed attorney, like the attorney in *Moran*, was turned away while attempting to contact respondent.

accused wishes to deal with police solely through counsel. To make that leap would be to cut *Jackson* loose entirely from the rationale that justified its prophylactic rule in the first place.

Moreover, far from suggesting that the appointment of counsel will render an accused incapable of validly waiving his right to counsel on his own, this Court made it express in *Michigan v. Harvey* that "nothing in the Sixth Amendment prevents a suspect charged with a crime and represented by counsel from voluntarily choosing, on his own, to speak with police in the absence of an attorney." 494 U.S. at 352.[7] *Harvey* emphasized that the Court has "explicitly declined to hold that a defendant who has obtained counsel cannot *himself* waive his right to counsel." *Id.* (emphasis added). Thus, the *Harvey* Court pointed out that in *Brewer v. Williams*, 430 U.S. 387 (1977), the Court went out of its way to emphasize that it was *not* holding that an indicted suspect who was represented by counsel and who was subjected to a police-initiated interview "could not, without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments," *id.* at 405-06. The Court has thus consistently preserved the possibility that even a defendant who has been appointed

[7] The statement in *Harvey* that "once a defendant obtains or even requests counsel . . . analysis of the waiver issue changes," 494 U.S. at 352, does not suggest any different result. In particular, it cannot be read to suggest that, once a defendant "obtains" counsel by having counsel appointed, the full protections of *Jackson* automatically apply. To the contrary, the *Harvey* Court immediately went on to explain expressly that "we have explicitly declined to hold that a defendant who has *obtained* counsel cannot himself waive his right to counsel." *Id.* (citing *Brewer v. Williams*, 430 U.S. 387, 405-06 (1977)) (emphasis added). The *Brewer* case to which the Court pointed as an example, moreover, involved a police-initiated interview. Thus, there can be no argument that, in holding open the possibility of waiver even for an accused who has counsel, the *Harvey* Court was considering solely a defendant-initiated contact with police.

counsel can be approached by the police in an effort to obtain a voluntary waiver of Sixth Amendment rights.

Any other result would run flatly counter to the often-repeated principle that the protections afforded in *Jackson* and *Edwards* are designed to protect a suspect's *own decision* to exercise his constitutional rights. To presume that, merely because counsel has been appointed, a defendant who has never announced a desire to deal with police solely through an attorney (or even a desire to *have* an attorney, for that matter) is somehow automatically rendered incapable of waiving his right to counsel in a police-initiated interview would run flatly counter to this Court's admonition that the "Sixth Amendment does not disable a criminal defendant from exercising his free will." *Harvey*, 494 U.S. at 353. To hold that the appointment of counsel, without more, triggers application of *Jackson* – thereby effectively disabling a defendant from responding to a police-initiated interview – "would be to 'imprison a man in his privileges and call it the Constitution.'" *Id.* (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 280 (1942)). The Court has consistently rejected such a course.

In sum, this Court's decisions make clear that the mere passive acceptance of appointed counsel does not trigger application of *Jackson*'s prophylactic rule. Even where a suspect has been indicted and appointed counsel, if he has never *asserted* his right to counsel and police initiate an interview by giving *Miranda* warnings and obtaining a waiver, that waiver is a valid relinquishment of Sixth Amendment rights. *Cf. Patterson*, 487 U.S. at 292-94.[8] Respondent Cobb

[8] This Court has consistently treated the ethical restrictions limiting prosecuting attorneys from contacting defendants represented by counsel as "not bear[ing] on the constitutional question" of a violation of Sixth Amendment rights. *United States v. Henry*, 447 U.S. 264, 275 n. 14 (1980) (continued...)

never affirmatively asserted his right to counsel; instead, he made a valid waiver of his rights after he was *Mirandized* by the Odessa police. Thus, even assuming that respondent's Sixth Amendment rights with respect to the double murder charge attached upon his indictment for the distinct crime of burglary, *but see infra* pp. 17-27, the lower court erred in excluding his voluntary confession to the double murder.

II. UPON INDICTMENT FOR ONE CRIME, THE RIGHT TO COUNSEL DOES NOT ATTACH FOR EVERY OTHER CRIME THAT COULD BE CONSIDERED "FACTUALLY RELATED."

The court below also committed a second and independent error in reversing Cobb's conviction. This Court has long held that the Sixth Amendment right to counsel is offense specific: it attaches only to the particular offense charged when formal criminal proceedings begin. *See, e.g., McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). Nevertheless, the Texas court here joined a number of other lower courts in adopting an exception to the offense-specific character of the right when a defendant is involved in multiple crimes that are, in some sense, "closely related." Under this exception, once the Sixth Amendment right attaches to one offense, it attaches to all "closely related" offenses and, similarly, an assertion of the right to counsel under *Jackson* applies to all "closely related" offenses. As the court below put it, the right attaches "to any other offense that is *very closely related factually* to the offense charged." Pet. App. A-6 (emphasis added). In this case, application of this exception led to the exclusion of respondent's confession to murder, even though he had been

[8] (...continued)
(citing Disciplinary Rule 7-104(A)(1)). *Amici*, therefore, do not here address the rules of professional conduct.

indicted (and had even arguably "asserted" his right to counsel) solely for the distinct crime of burglary.

The lower court's use of such an expansive exception to the offense-specific character of the Sixth Amendment right plainly warrants reversal. To begin with, the "closely related" exception has never been mandated by a decision of this Court. In addition, even if the Court were to endorse such an exception here, it should not adopt the broad, "factually related" standard endorsed below. Any exception to the offense-specific rule necessarily carries heavy costs in terms of frustrating legitimate police efforts to investigate uncharged (and unsolved) crimes. *See, e.g.*, *Moulton*, 474 U.S. at 180. If the Court endorses the exception at all, therefore, it should adopt a narrow "conduct-based" version of the exception, rather than the broad and unpredictable "factually related" variant used below.

A. This Court's Precedents Do Not Support a "Closely Related" Exception to the Offense-Specific Character of the Right to Counsel.

This Court has repeatedly held that the Sixth Amendment right to counsel is offense specific. *See McNeil*, 501 U.S. at 175; *see also Moulton*, 474 U.S. at 180 & n.16; *United States v. Gouveia*, 467 U.S. 180, 188 (1984). And just as the right itself is offense specific, "so also its *Michigan v. Jackson* effect of invalidating subsequent waivers in police-initiated interviews is offense specific." *McNeil*, 501 U.S. at 175. Nevertheless, some lower courts, including the court below in this case, have created an exception to the offense-specific character of the Sixth Amendment right. Here, the court below ruled that respondent's right to counsel for the crime of burglary carried over to the capital murder charge because the events surrounding the two crimes were "factually interwoven." Pet. App. A-7. Lower courts have typically purported to derive this "closely related" exception from two cases: *Brewer v. Williams*, 430 U.S. 387 (1977); and *Maine v.*

Moulton, 474 U.S. 159 (1985). *See, e.g.*, *United States v. Arnold*, 106 F.3d 37, 40-42 & n.1 (3d Cir. 1997).

It is true that in both *Brewer* and *Moulton*, (i) the defendant had been indicted and was represented by counsel on one crime; (ii) subsequent efforts by authorities elicited incriminating statements on another crime (not yet the subject of an indictment); and (iii) the Court still excluded the statements. In *Brewer*, police interviewed a suspect indicted for *kidnapping* and obtained statements implicating him in the *murder* of the kidnapping victim. The statements were held inadmissible in the trial for murder. *See Brewer*, 430 U.S. at 400. In *Moulton*, both Moulton and an accomplice were indicted for the *theft* of several vehicles and assorted auto parts and each retained counsel. The accomplice then aided police in obtaining incriminating statements from Moulton, and the statements were used to bring new indictments, including one for burglary for breaking into a car dealership to steal the auto parts. At trial, Moulton was convicted of *burglary* and *theft* in connection with two vehicles and the auto parts. *See Moulton*, 474 U.S. at 167. The Court, however, held the statements inadmissible. *See id.* 474 U.S. at 180.

Neither case, however, can be read as broadly establishing a general "closely related" exception. To the contrary, several factors demonstrate that the cases cannot be stretched in that fashion.

First, neither case mentioned, much less expressly approved, an exception to the rule that the Sixth Amendment is offense specific. *Moulton*, in fact, went to considerable lengths to emphasize the costs that would be imposed *without* the rule of offense-specificity. The Court explained that "to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, *would unnecessarily frustrate the public's*

interest in the investigation of criminal activities." 474 U.S. at 180 (emphasis added). Accordingly, the Court held in unequivocal terms that "[i]ncriminating statements pertaining to . . . crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses," *id.* at 180 n.16, even if obtained in the course of investigating "crimes for which formal charges have already been filed," *id.* at 179. The Court, moreover, later quoted *Moulton* extensively in reaffirming the rule of offense specificity in *McNeil*. *See* 501 U.S. at 175-76. *Cf. Whittlesey v. State*, 665 A.2d 223, 233-34 & n.8 (Md. 1995) (expressing doubt that *Moulton* and *Brewer* support any "closely related" exception).

Second, *Brewer* and *Moulton* both pre-date *McNeil*. Thus, even assuming they might once have been interpreted to support a "closely related" exception, *McNeil* undermines such a reading. *See, e.g.*, *People v. Clair*, 828 P.2d 705, 722 (Cal. 1992) (declaring *Brewer* "no longer vital" in the wake of *McNeil*).

Third, both *Brewer* and *Moulton* are, at bottom, *sui generis* decisions directed at what the Court considered to be unusual instances of inappropriate conduct by prosecuting authorities. In *Brewer*, the investigating officers assured the suspect's lawyer that they would not interrogate the suspect while transporting him across Iowa. Having made that agreement, the officers proceeded to engage the suspect in a conversation that the Court found tantamount to an interrogation, and thus violated the agreement with the suspect's lawyer. *See Brewer*, 430 U.S. at 390-91. The Court relied on the existence of the agreement in explaining its decision, *see id.*, 430 U.S. at 401 n.8, and Justice Stevens, whose vote was essential to the 5-4 decision, relied heavily on the agreement in his concurring opinion. *See id.*, 430 U.S. at

415 (Stevens, J., concurring). *See also Whittlesey*, 665 A.2d at 234 n.8 (distinguishing *Brewer* on this basis).

In *Moulton*, similarly, the Court declared the incriminating statements inadmissible after remarking critically on what it viewed as deceptive "conceal[ment]" by the police, and on their "knowing[] circumvent[ion]" of the defendant's Sixth Amendment rights. 474 U.S. at 177, 180. The Court found that police had used an undercover informant to elicit statements from Moulton when they "knew that Moulton would make statements that he had a constitutional right not to make to their agent prior to consulting with counsel." *Id.* at 177. Accordingly, the Court found that this *de facto* interrogation-by-agent concerning a crime for which the defendant had been charged violated the Sixth Amendment.

The holdings in *Brewer* and *Moulton* were thus linked to the Court's view that the police conduct in question involved (for case-specific reasons) some impropriety. Consequently, those decisions have limited application beyond their specific facts. To the extent they suggest that any sort of "closely related" exception should exist at all, they suggest the exception should be limited to similar cases involving some form of bad faith conduct deliberately aimed at circumventing Sixth Amendment rights. *Cf. United States v. Martinez*, 972 F.2d 1100, 1105 (9th Cir. 1992) (suggesting that inquiry into misconduct by prosecutorial authorities is a critical part of the "closely related" exception); *cf. also Whittlesey*, 665 A.2d at 234-35 (identifying line of cases that requires "evidence of deliberate police misconduct" for application of the "closely related" exception). A "closely related" exception limited in that fashion, moreover, would have no application in this case. There is not the slightest suggestion of police misconduct here. Rather, there is no indication that the officers who obtained respondent's confession were even aware of the burglary indictment, and the record makes it abundantly clear that they

scrupulously followed *Miranda* procedures to warn respondent of his rights.

Brewer and *Moulton*, in short, cannot be read to undermine the clarity of the rule reaffirmed subsequently in *McNeil*: "The Sixth Amendment right . . . is offense specific." 501 U.S. at 175. There is no basis for creating an exception for uncharged offenses that are in some sense "closely related" to the offense for which the Sixth Amendment right has attached.

B. Even Were the Court To Conclude That an Exception to the Rule of Offense Specificity Is Warranted, It Should Reject the Unpredictable and Unworkable Test Adopted Below.

If the Court holds that a "closely related" exception is warranted at all, it should reject the expansive version of that exception that was applied below. The Texas Court of Criminal Appeals declared that the capital murder charge here was "closely related" to the burglary charge simply because the two were "factually interwoven." Pet. App. A-7.

Construing the "closely related" exception in so broad a fashion – as encompassing any uncharged crime that can be viewed, in hindsight, as factually related to the charged offense – would make the exception utterly unpredictable and unworkable. Such a malleable test would all too often frustrate good-faith police work – just as it did in this case. As facts are unfolding in the course of an investigation, it would often be impossible to tell whether, under such a vague standard, a court might later consider distinct offenses part of a sufficiently intertwined series of facts to warrant carrying over Sixth Amendment protections from one crime to another. The rank-and-file membership of NAPO and CLEAT – the officers who are charged with implementing this Court's decisions on a daily basis in real-life situations – require clearer guidance in order

properly to balance effective law enforcement with respect for suspects' constitutional rights. This Court itself, indeed, has "frequently emphasized" the importance of rules that have a "clear, 'bright-line' quality." *Michigan v. Jackson*, 475 U.S. at 634.

If the Court recognizes a "closely related" exception at all, therefore, it should limit it to cases in which the conduct constituting the offense for which the accused has already invoked counsel *is the same conduct required to establish the offense (or an element of the offense) for which the State elicits information*. *Cf. Blockburger v. United States*, 284 U.S. 299, 304 (1932). Such a bright-line rule would provide better guidance for law enforcement officers investigating crimes and is the only version of the exception that even arguably finds support in this Court's precedents.

1. A "fact-based" test is unpredictable and produces inconsistent outcomes.

The unpredictability of the "fact-based" approach to determining whether two offenses are "closely related" is aptly illustrated by the confusing array of factors considered by the lower courts following that test. For example, in *United States v. Covarrubias*, 179 F.3d 1219 (9th Cir. 1999), the Ninth Circuit concluded that federal *immigration offenses* were closely related to state *kidnapping* offenses. There, the defendants had driven eight illegal aliens from Los Angeles to Washington State for a fee (hence the immigration charges). When one illegal alien refused to pay, the defendants held him hostage and demanded payment from his family (thus the kidnapping charge). *Id.* at 1221. The Ninth Circuit explained that it was necessary to consider "all of the facts and circumstances relating to the conduct involved, including the identity of the persons involved (including the victim, if any) and the timing, motive, and location of the crimes." *Id.* at 1225. Upon considering these factors, it concluded that the two

offenses were "closely related" for Sixth Amendment purposes because they arose from the same overall venture – the trip from L.A. to Washington. *Id.* at 1226. *See also United States v. Arnold*, 106 F.3d 37, 42 (3d Cir. 1997) (listing similar array of factors to consider, including whether the crimes "arise from the same facts and circumstances" and "are closely related in time").

In *United States v. Nocella*, 849 F.2d 33 (1st Cir. 1988), the fact-based test produced a different result. There, a single, lengthy investigation into the defendant's drug trafficking activities produced evidence of marijuana possession (on which defendant was indicted under state law and appointed counsel) and later evidence of distributing cocaine. Upon the federal trial for distributing cocaine, the court concluded that the two crimes were not "closely related." In the court's view, "the cocaine sales, though conceptually linked to the marijuana possession if broad rubrics like 'drug-related' are employed, were to all meaningful intents and purposes distinct offenses." *Id.* at 38. It seems likely, however, that a court considering some of the vague formulations of the fact-based test (including, for example, whether crimes were part of the same course of criminal conduct) might have concluded that these two drug-trafficking crimes *were* closely related.

In short, the determination whether two crimes constitute part of the "same venture," or arise from a "common base of evidence," or are "connected" can turn on a countless variety of unpredictable factors, including the time frame that a court considers, *see, e.g.*, *People v. Clankie*, 530 N.E. 2d 448, 452 (Ill. 1988) (four separate burglaries of a home during one-month period constituted one course of conduct); the level of generality at which the court describes the criminal "venture," *see Nocella*, *supra;* and so on.

These myriad factors provide such limitless flexibility that different judges could easily come to different conclusions

on the same facts. Under such a test, front-line officers thus would have no way to predict whether an apparently distinct crime might later, in hindsight, be deemed factually related to another crime for which a suspect had already been indicted. *Cf., e.g.*, *United States v. Olsen*, 840 F. Supp. 842, 852 (D. Utah 1993) ("The 'inextricably intertwined' concept does not give a bright line to officers as to what they can do or must avoid . . . ."). As this Court has noted, the ability of police to continue investigating uncharged crimes even after a suspect has been indicted on one offense is critical for effective law enforcement. *See Moulton*, 474 U.S. at 179-80. But the vague and unpredictable fact-based approach to the "closely related" exception would deter such investigations and thereby "unnecessarily frustrate the public's interest in the investigation of criminal activities." *Id.* at 180.

2. A "conduct-based" analysis focusing on the legal elements of the crimes is predictable and workable.

In contrast to the unpredictable and infinitely malleable test based on whether offenses are deemed "factually related," some lower courts have articulated a narrower and more predictable standard. By focusing on the specific conduct that satisfies the elements of the crimes in question, these courts have applied a more workable standard that is by far preferable to the uncertain fact-based test described above.

The Fifth Circuit's decision in *United States v. Cooper*, 949 F.2d 737 (5th Cir. 1991), provides the clearest example. Cooper robbed a convenience store using a sawed-off shotgun. *See id.* at 745. When police located Cooper's car and impounded it, an inventory search uncovered the shotgun in the trunk. Cooper was later arrested, charged with aggravated robbery, and appointed counsel. Six days later a federal agent interviewed Cooper about the shotgun and Cooper admitted

possessing it. Cooper was later charged in federal court with possession of an unregistered firearm. *See id.* at 740-41.

The Fifth Circuit refused to suppress Cooper's statements about the gun on Sixth Amendment grounds because "the federal and state crimes concern different conduct." *Id.* at 744. It did not matter, in the court's view, that the crimes arose from a common set of facts or series of events; to the contrary, the court readily acknowledged that, "efficiently for the governments, both prosecutions could use much of the same evidence." *Id.* The critical factor in the court's analysis was that the elements of the crimes were distinct.

Other courts have similarly pointed to the elements of the offenses at issue as at least part of the basis for distinguishing offenses before them for Sixth Amendment purposes. *See, e.g., Hendricks v. Vasquez*, 974 F.2d 1099, 1104 (9th Cir. 1992) ("Although not wholly unrelated, the two crimes have totally independent elements."). Indeed, in the *Nocella* case described above, the First Circuit effectively relied in large part on a conduct-based test for distinguishing two drug-trafficking crimes as it noted that the crimes "necessitated proof of different elements." 849 F.2d at 38. *Cf. also Hellum v. Warden*, 28 F.3d 903, 909 (8th Cir. 1994) (distinguishing two offenses because the new crime had "distinct elements from the various charges stemming from the events [at] bar").

A test focusing on the conduct that establishes the legal elements of the crimes in question – and, specifically, whether the elements of one are subsumed in the other – is less subject to confusion and manipulation than a vague inquiry into whether the crimes are "factually interwoven." Accordingly, if the Court is inclined to recognize a "closely related" exception to the rule of offense specificity at all, it should adopt this narrow, more predictable "conduct-based" test.

A conduct-based test is also the only articulation of the exception that is even arguably supported by this Court's decision in *Moulton*. In *Moulton*, the incriminating statements obtained afer Moulton's indictment for theft were used to expand the charges against him from theft to burglary. Moulton was then convicted of both burglary and theft. *See State v. Moulton*, 481 A.2d 155, 157 (Me. 1984). Under Maine law, burglary is defined as "enter[ing] or surreptitiously remain[ing] in a structure . . . with the intent to commit a crime therein." Me. Rev. Stat. Ann. tit. 17, § 401 (1983). The elements of the burglary charge in *Moulton* were met with the underlying theft charge combined with breaking into a car dealership. The only exception for closely related offenses suggested by *Moulton*, therefore, applies where one offense constitutes an element of the other.

If a conduct-based test were applied in this case, moreover, respondent's two crimes would *not* be considered "closely related." Under Texas law, burglary and murder are clearly defined by entirely different conduct. *See Fearance v. State*, 771 S.W.2d 486, 493 (Tex. Crim. App. 1988) (en banc) (explaining that burglary is "a property offense" and that burglary thus established "felonious criminal conduct" entirely distinct from an "assault [causing] the death of [the victim]."). As in *Cooper*, much of the same evidence might be used in the prosecution of both crimes. But, also as in *Cooper*, the specific conduct that constitutes each offense is entirely distinct. The offense of burglary was complete when respondent entered the Owings' house with the intent to commit theft. *See* Tex. Penal Code Ann. § 30.02(a)(1). The offense of capital murder involved the entirely separate conduct of killing Margaret and Kori Rae Owings, and specifically it was respondent's conduct in killing two persons that made the crime capital murder. *See* Tex. Penal Code Ann. § 19.03(a)(7). The conduct that constituted the offense of burglary was never used as any

element of the crime of murder with which respondent was charged. Thus, under a conduct-based test for applying the "closely related" exception, respondent's indictment for the burglary would *not* have triggered his Sixth Amendment right to counsel with respect to the murder charge. His conviction, accordingly, should stand, and the good-faith police work that secured his confession should not be frustrated.

III. THE DECISION BELOW CREATES AN UNWORKABLE RULE THAT WILL HOBBLE GOOD-FAITH POLICE EFFORTS TO QUESTION SUSPECTS ABOUT UNSOLVED CRIMES AS TO WHICH NO CHARGES HAVE YET BEEN BROUGHT.

By expansively applying the rule from *Jackson* even to cases where a suspect has not made any affirmative assertion of his right to counsel, and by broadly interpreting the standard for determining whether two offenses are "closely related," the Texas Court of Criminal Appeals created an unworkable rule that will unduly hinder legitimate police efforts to solve crimes.

Under the decision below, even where police have insufficient evidence to charge a suspect with a crime, and even where that suspect has never made any affirmative assertion of his right to counsel, questioning will be barred (absent the presence of counsel) if the unsolved crime is, under some vague standard, deemed "closely factually related" to another crime on which charges have been brought. The rule is especially unworkable when combined – as it was here – with an unwarranted and unrealistically broad presumption that knowledge concerning appointment of counsel for a suspect must be imputed to *all* state actors. The facts in this case aptly illustrate the impossible situation in which the decision places police. The court below presumed that officers in Odessa had the same knowledge about counsel being appointed for

respondent as did the sheriff's office in Walker, Texas – over 500 miles away.

That is simply unrealistic, and will have a significant impact in thwarting routine police investigations and interrogations. Police forces from different local jurisdictions within a State may often participate in investigating the same or related crimes. Whenever a suspect has moved to a new city, for example, or fled from one local jurisdiction to another while released on bail, a different police force may arrest or interrogate a suspect on a new warrant when there has been a break in an unsolved case. Questioning a suspect swiftly to follow up on new leads can often be critical for solving the case. That is particularly true where, as here, the break in the case comes from a confession to a third party months after the crime. Following up on a suspect who is in a frame of mind to confess can often be the *only* way to resolve a case that might otherwise linger unsolved for years. Efforts to secure respondent's confession were thus nothing less than effective and proper police work. As noted above, this Court has consistently recognized that "[a]dmissions of guilt are more than merely 'desirable,' they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran*, 475 U.S. at 426 (citation omitted). The fact that officers in an entirely different jurisdiction knew that respondent had counsel on the distinct charge of burglary provides no sound basis for discarding the fruits of legitimate and good-faith police work.

Under the rule in this case, moreover, it would not be enough for officers in one jurisdiction simply to ascertain the objective facts about proceedings elsewhere – such as whether a suspect has been indicted on the particular charge they were investigating. In this case, for example, officers in Odessa were alerted by respondent's father that respondent had confessed to *murder* and arrested respondent on a warrant for

murder. Respondent had never been indicted for that crime. Yet the holding below was that his Sixth Amendment rights had attached anyway. Under that ruling, law enforcement officers would face an impossible task. Officers in one local jurisdiction would have to investigate scrupulously all the proceedings in another jurisdiction to determine, for example, whether a suspect had been indicted on any crimes, whether counsel had been appointed, and whether the suspect had ever asserted his right to counsel. But that is not all. The officers would then have to act essentially as lawyers to make the subtle determination whether the crime they were investigating was, in some sense, "closely related" to a crime charged elsewhere. It is wholly unrealistic to expect police to play such a role.

The only result of such a rule will be to hobble legitimate and good-faith police work. In this regard, it bears emphasizing that the officers who interviewed respondent handled this case absolutely according to the book. There is not even a hint of police misconduct here, nor even of an error that the officers in Odessa could have avoided. To the contrary, the officers in Odessa fully complied with the requirements of *Miranda* before interviewing respondent. Indeed, they adhered to a procedure under Texas law that is *more* protective than the *Miranda* guidelines and under which they advised respondent of his rights in writing and received a written waiver signed before a witness. *See* Tex. Code Crim. Proc. Ann. art. 38.22, § 2. The expansive rules applied by the Texas Court of Criminal Appeals to suppress respondent's statement were thus particularly unwarranted, because the ordinary procedures that the police used fully protected respondent's constitutional rights under this Court's precedents.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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